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State of Utah v. James J. Contrel : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

930588 CA

STATE OF UTAH,	:	
Plaintiff/Appellee,	:	Case No. 930588-CA
v.	:	Priority No. 2
JAMES J. CONTREL,	:	
Defendant/Appellant,	:	

BRIEF OF APPELLEE

THIS IS AN APPEAL FROM A CONVICTION FOR POSSESSION OF A CONTROLLED SUBSTANCE, A THIRD DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 58-37-8(2)(A)(II) (SUPP. 1993), IN THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR JUAB COUNTY, STATE OF UTAH, THE HONORABLE RAY M. HARDING, PRESIDING.

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BRIEF OF APPELLEE

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JURISDICTION AND NATURE OF PROCEEDINGS

This is an appeal from a conviction for possession of a controlled substance, a second degree felony, in violation of Utah Code Ann. § 58-37-8(2)(a)(i) (Supp. 1993), in the Fourth Judicial District Court in and for Juab County, State of Utah, the Honorable Ray M. Harding, presiding. This Court has jurisdiction to hear the case pursuant to Utah Code Ann. § 78-2a-3(2)(f) (Supp. 1993).

STATEMENT OF THE ISSUES PRESENTED AND STANDARDS OF APPELLATE REVIEW

The following issues were presented to the trial court below and were properly preserved for appellate review under defendant's conditional guilty plea:

1. Did the trial court properly determine that the investigating officers had a reasonable suspicion of narcotics trafficking to support stopping defendant's truck? A trial court's determination of whether an investigative stop was supported by reasonable suspicion is a conclusion of law that is reviewed for correctness. State v. Pena, 869 P.2d 932, 939 (Utah

1994). The trial court's ruling is, however, should not be subjected to "a close, de novo review." Id. Rather, some deference is accorded the trial court because the reasonable suspicion standard itself conveys a measure of discretion to trial courts so that they can "grapple with the multitude of fact patterns that may constitute a reasonable-suspicion determination." Id. at 939-40. The trial court's findings on purely factual issues, such as witness credibility and historical facts, are reviewed for clear error. Id. at 939 n.4.

2. Does article I, section 14 of the Utah Constitution require that the State prove that defendant was aware of his right to refuse a request to search before his consent to search can be deemed valid? The trial court's refusal to depart from the federal voluntariness of consent standard is the result of the interpretation of a constitutional provision, which is a pure question of law that is reviewed under a correction of error standard with no deference accorded the trial court. State v. Mitchell, 824 P.2d 469, 471 (Utah App. 1991).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Except for a few inconsequential grammatical differences, the fourth amendment of the United States Constitution and article I, section 14 of the Utah Constitution are identical:

> **U.S. Const. Amend. IV:**
>
> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but

upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Article 1, Section 14 of the Constitution of Utah:

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated; and no warrant shall issue but upon probable cause supported by oath or affirmation, and particularly describing the place to be searched, and the person or thing to be seized.

STATEMENT OF THE CASE

Defendant was charged by information with possession of a controlled substance (marijuana), a second degree felony, in violation of Utah Code Ann. § 58-37-8(2)(a)(i) (Supp. 1993) (R. 1). Defendant moved to suppress the over 100 pounds of marijuana that were seized during a consensual search of the pickup truck he was driving at the time he was stopped (R. 19-41). After an evidentiary hearing and submission of memorandum, the trial court denied defendant's motion and entered a memorandum decision specifying its reasons for so ruling (R. 57-60). It subsequently entered a signed order denying defendant's motion (R. 61) and made written findings of fact and conclusions of law (R. 62-5). (The court's decision, order, and findings are attached hereto as Addendum A, B and C, respectively).

Defendant entered a negotiated plea agreement in which the State reduced the charge to a third degree felony and allowed defendant to condition his plea on the right to appeal the denial of his motion to suppress (R. 74-81). The trial court accepted

the plea agreement and sentenced defendant to a term of zero to five years in the Utah State Prison and ordered defendant to pay a fine of $5,000.00 (R. 100-01).

STATEMENT OF THE FACTS

At the hearings below, Sergeant Paul Mangelson, one of the investigating officers, was the only person to testify. Based on Sergeant Mangelson's uncontroverted testimony, the trial court entered extensive findings of facts (R. 62-65). See Addendum C. Those findings are reproduced below.

1. On February 4, 1992 Sergeant Paul Mangelson, a 25 year veteran of the Utah Highway Patrol[,] was patrolling I-15 within Juab County together with Trooper Lance Bushnell.

2. Both Sergeant Mangelson and Trooper Bushnell have had extensive training and experience in the area of drug law enforcement and drug identification. Sergeant Mangelson has been involved in many cases involving compartments within motor vehicles used to conceal controlled substances.

3. While patrolling, Sergeant Mangelson observed a northbound pickup truck, and made the following observations prior to stopping the vehicle:

a. The vehicle was a 1990 Chevrolet pickup.

b. The edge of the rear bumper had been bent [upward at a 45 degree angel] so as to conceal the area behind it.

c. The gas tank was much lower than that of a stock model truck.

d. The vehicle had been recently undercoated (observable in the rear tire area).

e. Unlike stock model vehicles, the vehicle had no air space between the truck bed and the frame.

f. [Unlike stock model vehicles, the] vehicle also had bright yellow, oversized shock absorbers, a bed liner, and a tool box in the bed area.

4. Sergeant Mangelson noted that the vehicle was identical in every respect (except for its color) to a vehicle he had seized several months earlier containing a secret compartment behind the bumper in which Mangelson had discovered large quantities of contraband.

5. Based upon Sergeant Mangelson's observations and his past experience, the officers stopped the vehicle, with the intent to search the vehicle for a hidden compartment.

6. The driver of the vehicle was the defendant, James John Contrel. The driver produced a Florida driver's license and a Pennsylvania registration. The driver said the vehicle belonged to his friend Carmen, but he did not know Carmen's address or telephone number.

7. The officer asked the defendant if he was transporting drugs or if there were any firearms or contraband in the vehicle. The defendant replied "No". The officer then asked for consent to search the vehicle. The defendant gave consent to search the vehicle, both orally and in writing.

8. The officers then went to the rear of the vehicle and accessed the secret compartment, exactly as Sergeant Mangelson did in the previous case, and after they removed the cover plate, found in excess of 100 lbs. of marijuana in the hidden compartment. The defendant was thereafter arrested. (R. 62-4)

Photographs of the altered truck driven by defendant, as well as a photograph of a "stock model," were admitted below, and Mangelson explained the significance of each photograph. See Exhibits 1, 2, 4, 5, 8, 10, 14 and 15, which are discussed at pages 111 to 114 and 135 to 141 of the record.

Based on its findings of fact, the trial court concluded that the stop of defendant's vehicle was supported by reasonable suspicion and that the scope of detention was strictly tied to the purpose of the stop. It further held that defendant's consent to search the vehicle was given voluntarily. Finally, the court rejected defendant's claim that article I, section 14 of the Utah constitution required that he knowingly waive his right to refuse a request for consent to search in order for his consent to be valid (R. 65). See Addendum C.

SUMMARY OF THE ARGUMENT

The trial court properly determined that the investigative stop of defendant's truck was supported by reasonable suspicion of narcotics trafficking. Defendant's truck had numerous distinctive alterations from stock models that were similar to those Mangelson and Bushnell had observed on other

trucks with concealed compartments containing contraband, and the truck was traveling a well known drug trafficking route. Cf. State v. Poole, 234 Utah Adv. Rep. 3 (Utah 1994) (holding that Sergeant Mangelson and Trooper Bushnell had probable cause to search truck based on facts nearly identical to those presented in this case). Given that the standard for establishing reasonable suspicion is significantly lower than that needed to establish probable cause, the trial court's ruling is clearly correct and should be affirmed.

This Court also should uphold the trial court's refusal to adopt a different standard for establishing the validity of a consent to search under article I, section 14 of the Utah Constitution than is required under the fourth amendment of the United States Constitution. Under State v. Watts, 750 P.2d 1219 (Utah 1988), it is clear that the two provisions are to be interpreted identically. The narrow exception to that general rule is for the purpose of "insulating this State's citizens from the vagaries of inconsistent interpretations given the fourth amendment by federal courts." Id. at 1221 n.8. The federal voluntariness standard for determining the validity of a consent to search is well-established and has been consistently applied since it was first articulated by the United States Supreme Court in Schneckloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041 (1973). Accordingly, under Watts, there is no basis for departing from the federal voluntariness test for consensual searches. Even if there were such a basis, adoption of the waiver standard

advocated by defendant is not supported by the state constitutional analysis called for under State v. Bobo, 803 P.2d 1268 (Utah App. 1990).

ARGUMENT

POINT I

THE TRIAL COURT PROPERLY DETERMINED THAT THE STOP OF DEFENDANT'S TRUCK WAS SUPPORTED BY REASONABLE SUSPICION OF NARCOTICS TRAFFICKING

The trial court's determination that "[t]he stop of the subject vehicle was a constitutionally valid stop based upon reasonable suspicion that the subject vehicle had a hidden compartment containing contraband" (R. 95) was correct under State v. Poole, 234 Utah Adv. Rep. 3 (Utah 1994) and the well-established principle that the degree of proof needed to establish reasonable suspicion is significantly lower than that required for probable cause.

The facts of Poole are strikingly similar to those of this case. In Poole, Sergeant Mangelson and Trooper Bushnell stopped a vehicle on I-15 near Nephi because they suspected the driver was intoxicated. During the course of the stop, it became apparent that the truck had a hidden compartment under its bed:

> Mangelson testified that he started "exploring" the bed of the truck while Bushnell was searching the cab [pursuant to the driver's consent]. He examined the top and bottom of the flatbed and measured lines that were six to eight inches apart. This discrepancy, indicating the possibility of a concealed compartment, prompted Mangelson to continue his investigation on the theory that the concealed compartment likely contained contraband. Mangelson asked Poole to lift up a piece of plywood resting on the truck bed.

> Using a screwdriver, Mangelson then pried open a section of metal sheeting and discovered a six- to eight-inch-high compartment beneath the flatbed. At this time, Poole withdrew his consent for a further search. However, Mangelson continued his search by removing the metal sheeting, which provided him with a clear view of contraband within the enclosed compartment. The officer ultimately retrieved almost 200 pounds of marijuana.

Poole, 235 Utah Adv. Rep. at 3.

In light of these facts, the trial court in Poole determined that the continued search after consent had been withdrawn was illegal because the officers lacked probable cause. Id. at 4. The Utah Supreme Court reversed the trial court's ruling because the trial court erroneously elevated the probable cause standard to "unrealistic heights." Id. In holding that the trial court's probable cause ruling was incorrect, the Supreme Court examined the totality of circumstances and identified several factors that collectively established probable cause:

> First and foremost, the truck had a significant and unusual alteration in its bed which was in plain view and which ***concealed*** a secret compartment. Second, this truck was traveling a known drug trafficking route. Third, the compartment was discovered by an officer with twenty-four years of experience in the field who had seen other false beds that contained contraband. Fourth, one of the vehicle's passengers held a large wad of money. Fifth, both defendants appeared extremely nervous during the stop. Sixth, the cab of the truck contained a wrench with a socket that matched the bolt securing the secret compartment. The false bed in connection with these other enumerated factors gave rise to probable cause for a search. Practically speaking, it was

> probable that criminal activity was occurring.

Poole, 234 Utah Adv. Rep. at 4 (footnotes omitted).

Most of the factors present in Poole are present in this case. First, Mangelson provided detailed testimony about the alterations to the truck that were plainly visible before the stop was initiated and explained why those alterations indicated the presence of a concealed compartment (R. 134-140). See Exhibits 1, 2, 4, 5, 8, 10, 14 (photographs of the altered vehicle driven by defendant). Second, defendant's altered truck was stopped on I-15 near Nephi, a well known drug trafficking route. See Poole, 234 Utah Adv. Rep. at 4, n.1. (taking judicial notice of "[t]he fact that Interstate 15 is an established route for illegal drug trafficking"). Finally, the two highly trained and experienced officers involved in Poole, Mangelson and Bushnell, completed the stop in this case.

Unlike Poole, here the trial court only had to resolve the issue of whether the totality of the circumstances gave rise to reasonable suspicion; it did not have to address the issue of whether the more demanding probable cause standard had been met. That distinction is significant because the degree of proof needed to establish reasonable suspicion is less than that needed to establish probable cause:

> The Fourth Amendment requires "some minimal objective justification" for making [an investigative] stop. That level of suspicion is considerably less than proof of wrongdoing by a preponderance of the evidence. We have held that probable cause means "a fair probability that contraband or evidence of a

> crime will be found," and the level of suspicion required for a Terry stop is obviously less demanding than probable cause[.]

United States v. Sokolow, 490 U.S. 1, 7, 109 S. Ct. 1581, 1585 (1989) (citations and some internal quotation marks omitted). Accord Terry v. Ohio,392 U.S. 1, 30, 88 S. Ct. 1868, 1884 (1968). This Court has likewise held that reasonable suspicion requires only a minimal level of certainty by stating, in State v. Menke, 787 P.2d 537, 541 (Utah App. 1990), that reasonable suspicion "must be based on objectives facts suggesting that the individual may be involved in criminal activity."

In this case, the uncontroverted facts clearly support the trial court's reasonable suspicion determination. As the Court explained in Poole:

> The highway patrolmen here were confronted with an unusual adaption to a vehicle quite different from the standard characteristics of nearly every other truck on the road. Simply stated, people ordinarily do not carry legal items in the hidden compartment of a gas tank, the concealed portion of a hubcap, or, for that matter, in a secret compartment in the false bed of a pickup truck.

Poole, 234 Utah Adv. Rep. at 5.[1]

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[1] In this case, Mangelson testified, and the trial court found, that Mangelson had "been involved in many cases involving compartments within motor vehicles used to conceal controlled substances" (R. 63). Of those, seven were trucks with hidden "bed compartments" (R. 142). Moreover, one of the trucks in which Mangelson discovered a concealed compartment containing contraband was identical to the truck in this case in every respect except color (R. 64), and three others were similar. Of the four trucks in which Mangelson found a concealed compartment similar to the one in this case, all but one contained contraband (R. 108, 142, 153).

The presence of a concealed compartment as recognized by highly trained and experienced officers who had previously retrieved contraband from other similarly altered trucks traveling the same well established drug route easily satisfies the minimal objective justification standard required to establish reasonable suspicion. Moreover, as the trial court ruled: "From his personal experience with this prior case, Mangelson learned that the sole apparent purpose for many of the unique modifications [made to defendant's truck] was to conceal [a secret compartment] and transport contraband. Based on this specific prior personal experience with a virtually identical modified vehicle, the sergeant's suspicion was reasonable" (R. 58). Because the totality of the circumstances known to the officers at the time of the stop reasonably suggested that criminal activity may have been afoot, the trial court's finding of reasonable suspicion should be upheld.

POINT II

THE STANDARD FOR ESTABLISHING A VALID CONSENT TO SEARCH UNDER ARTICLE I, SECTION 14 OF THE UTAH CONSTITUTION IS THE SAME AS THAT REQUIRED UNDER THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION

The trial court properly rejected defendant's invitation to interpret article I, section 14 of the Utah Constitution differently than the fourth amendment of the United States Constitution.[2] As explained below, this Court should

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[2] Defendant has elected not to challenge the trial court determination that defendant's consent was voluntary under the (continued...)

affirm the trial court's ruling on the ground that the narrow criteria for departing from federal fourth amendment jurisprudence articulated by the Utah Supreme Court in State v. Watts, 750 P.2d 1219 (Utah 1988), are not present in the context of consensual searches.

In Watts, the Utah Supreme Court clearly stated its position on the issue of how article I, section 14 should be interpreted in light of the fourth amendment:

> Article I, section 14 of the Utah Constitution reads nearly verbatim with the fourth amendment, and thus this Court had never drawn any distinctions between the protections afforded by the respective constitutional provisions. Rather, the Court has always considered the protections afforded to be one and the same.

Watts, 750 P.2d at 1221. See also State v. Jasso, 439 P.2d 844 (Utah 1968); State v. Criscola, 444 P.2d 517 (Utah 1968); State v. Lopes, 552 P.2d 120 (Utah 1976) (all construing Article I, Section 14 as providing the same scope of protection as the fourth amendment).

However, the Utah Supreme Court in Watts also noted:

> In declining to depart in this case from our consistent refusal heretofore to interpret article I, section 14 of our constitution in a manner different from the fourth amendment to the federal constitution,

---

[2](...continued)
fourth amendment. Defendant's determination not challenge the trial court's fourth amendment ruling is well-measured given the uncontroverted evidence demonstrating that he consented the search both orally and in writing (R. 59, 64). See Exhibit 12, written consent form signed by defendant. Under these circumstances, defendant's state constitutional challenge to the validity of his consent is squarely before this court.

> we have by no means ruled out the possibility of doing so in some future case. Indeed, choosing to give the Utah Constitution a somewhat different construction may prove to be an appropriate method for insulating this state's citizens from the vagaries of inconsistent interpretations given the fourth amendment by the federal courts.

Watts, 750 P.2d at 1221 n.8 (citations omitted).

Significantly, the Court in Watts provided only a narrow basis for departing from fourth amendment jurisprudence. It did not indicate that departure was proper simply because some standard other than that adopted by the United States Supreme Court might be considered more desirable. Cf. Christine M. Durham, Employing the Utah Constitution in Utah Courts, 2 Utah B.J., Nov. 1989, at 26 (Justice Durham cautions against state constitutional interpretation that is "result-oriented and therefore unprincipled"). Justice Stewart recently echoed sentiments similar to those expressed by Justice Durham:

> . . . I think it inappropriate for this Court to use Article I, Section 14, the Utah unreasonable search and seizure provision, to attempt to "fine tune" federal constitutional search and seizure law. I may, as do other judges, disagree from time to time with the United States Supreme Court on a particular search and seizure opinion. But in my view, that alone does not justify resorting to Article I, Section 14 to achieve a different result.

Poole, 234 Utah Adv. Rep. at 6, Stewart, J., concurring.

The Watts exception is appropriate because it strikes a balance between the danger of rendering result-oriented opinions while at the same time allowing the flexibility needed to simplify federal law when it becomes hopelessly confused. Since

Watts, both the Utah Supreme Court and this Court have given article I, section 14 a different interpretation than that given to the fourth amendment in specific settings. As discussed below, in each instance where Utah's appellate courts have departed from federal search and seizure standards, they have done so because of inconsistencies or confusion in the federal analysis.

In State v. Thompson, 810 P.2d 415 (Utah 1991), the Utah Supreme Court rejected the United States Supreme Court ruling in United States v. Miller, 425 U.S. 435 (1976), and held that under the state constitution, citizens have an expectation of privacy in their bank records such that a showing of probable cause is required before bank records may be seized. The Thompson court noted that "[t]he result reached in Miller has been roundly criticized" because it departed from the traditional expectation of privacy test enunciated in Katz v. United States, 389 U.S. 347, 351-52, 88 S. Ct. 507, 511-12 (1967). Thompson, 810 P.2d at 417 (citations omitted). The Thompson court explained that Katz recognized that "'what [a person] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected,'" because "'the Fourth Amendment protects people, not places.'" Id., at 418 (quoting Katz, 88 S. Ct. at 511-12). In contrast, in holding that a depositor has no legitimate expectation of privacy in his bank records and no standing under the fourth amendment to challenge their seizure, "[t]he Miller court abandoned [the Katz]

rationale, relying instead 'for its analysis of an expectation of privacy upon the ownership and possession of the records and the reasonable expectations of the individual.'" Id. (citations omitted).

Having identified the conflicting principles advanced in Katz and Miller, the Utah Supreme Court joined several other states that had already rejected Miller in favor of the traditional expectation of privacy test articulated in Katz. Thompson 810 P.2d at 417-18. The court then held that under article I, section 14 of the Utah Constitution, the defendants had standing to challenge the search and seizure of their bank records. Id. at 418.

Similarly, this Court in State v. Sims, 808 P.2d 141, 149 (Utah App. 1991), petition for cert. dismissed as improvidently granted, 239 Utah Adv. Rep. 60 (Utah 1994), relied on article I, section 14 to clarify confusion caused by the United States Supreme Court's decision in Michigan Dep't of State Police v. Sitz, ___ U.S. ___, 110 S. Ct. 2481 (1990). In Sitz,

> the Court considered an investigatory roadblock, a "sobriety checkpoint," operated by the Michigan State Police Department. The checkpoint was operated under guidelines created by a special state advisory committee composed of law enforcement officials and transportation researchers from the University of Michigan. Those guidelines governed checkpoint publicity, site selection, and police procedure at the checkpoint itself.
>
> Under the guidelines, all motorists traveling through the checkpoint were stopped and briefly checked for intoxication. Only if the initial examination revealed signs of intoxication would a motorist be directed out

> of the traffic flow for a driver's license and registration check and further sobriety tests. . . .

Sims, 808 P.2d at 146 (citations omitted).

In holding that the Michigan roadblock did not violate the fourth amendment, the Sitz Court employed a balancing test. Specifically, it found that the brief detention of motorists was only a "slight" infringement of their fourth amendment interests and that that slight infringement was outweighed by "the magnitude of the drunken driving problem [and] the States' interests in eradicating it," along with the Court's assessment that the one and one-half percent drunk driver arrest rate demonstrated that the checkpoint adequately advanced that interest. Sitz, 110 S. Ct. at 2485-88.[3]

In contrast to the roadblock that was upheld in Sitz, the roadblock at issue in Sims was not conducted in accordance with an explicit plan, beyond a determination that all vehicles other than large trucks were to be stopped. Moreover, the roadblock was of an "all-purpose" variety. Sims, 808 P.2d at 146. Instead of focusing on a particular public concern, such as drunk driving, officers at the Utah roadblock checked all vehicles except large trucks for licenses, registration, equipment problems, driver sobriety, and signs of illicit drugs, without any suspicion of wrongdoing. The process by which the

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[3] On remand from the United States Supreme Court, the Michigan Court of Appeals held that the roadblock violated the Michigan Constitution. Michigan Dep't of State Police v. Sitz, 485 N.W.2d 135 (Mich. App. 1992).

roadblock was authorized also lacked features of political accountability that were arguably present in Sitz, and there was no indication that the process of authorization involved any balancing of fourth amendment interests against law enforcement interests. Id. at 146-47.

After explaining that in its view Sitz requires that there be "explicit guidelines, developed in a politically accountable manner that includes balancing of the relevant concerns . . . [as] a prerequisite to any judicial balancing analysis of a suspicionless roadblock," the Sims Court held that the roadblock violated the fourth amendment.

However, this Court did not limit its analysis to the federal constitution. It further stated that "[c]onsistent with our supreme court's emphasis on the warrant requirement [in Larocco], . . . we hold that suspicionless, investigatory motor vehicle roadblocks, conducted without legislative authorization, are per se unconstitutional under article I, section 14 of the Utah Constitution." Id. at 149. In so doing, this Court sought to clarify the Sitz requirement that suspicionless investigative roadblocks be the product of a politically accountable process. It explained that "the legislature [should] perform the Sitz-type balancing function if and when it decides to consider the authorization of such roadblocks." Id. Consequently, this Court in Sims acted within the narrow exception articulated in Watts because it retrieved the legislative function that the Sitz Court had inexplicably placed in the hands of law enforcement and

returned it to its proper guardian -- the Utah State Legislature. In so doing, this Court ended any confusion about how the balancing test described in Sitz was to be applied and what entities would be deemed "politically accountable" under the Sitz standard.

The plurality opinion in State v. Larocco, 794 P.2d 460, 466 (Utah 1990), though clearly not the law in Utah because it does not represent the view of a majority of the Utah Supreme Court[4], is nevertheless helpful in understanding the parameters of the Watts exception. In Larocco, Justices Durham and Zimmerman formed a plurality and rejected the rationale of New York v. Class, 475 U.S. 106 (1986). In so doing, the Larocco plurality joined several other jurisdictions in holding that the opening of a car door to inspect a vehicle identification constituted a search under the state constitution, even though such conduct was deemed not to be a search under the fourth amendment in Class. The Larocco plurality then deemed the search unreasonable under because it was conducted without a warrant and there were no exigent circumstances to justify the warrantless search. Larocco, 794 P.2d at 469-71.

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[4] See Sims v. State Tax Commission, 841 P.2d 6, 15-6 (Utah 1992), Stewart, J., concurring in result, (Larocco state constitutional analysis "did not represent the views of a majority of this Court"); Poole, 234 Utah Adv. Rep. at 6, Stewart, J., concurring, (emphasizing that he concurred only in the result reached in Larocco and expressly stating that his vote did not indicate an acceptance of the state constitutional theory asserted therein).

In deciding to depart from the federal standard, Justice Durham provided an in depth discussion of the United States Supreme Court's "inconsistent treatment of the fourth amendment" and explained the conflict between the Court's "reasonableness" approach as applied in some fourth amendment cases and its "warrant" approach as applied in other fourth amendment cases. Larocco, 794 P.2d at 466-67. After documenting the problems created by the United States Supreme Court's "vacillation between the warrant approach and the reasonableness approach" in the context of automobile searches, the Larocco plurality concluded:

> The time has come for this court, in applying an automobile exception to the warrant requirement of article I, section 14 of the Utah Constitution, to try to simplify, if possible, the search and seizure rules so that they can be more easily followed by the police and the courts and, at the same time, provide the public with consistent and predictable protection against unreasonable searches and seizures. This can be accomplished by eliminating some of the confusing exceptions to the warrant requirement that have been developed by federal law in recent years.

Id. at 469 (citation omitted). The plurality then stated that it would "continue to use the concept of expectation of privacy as a suitable threshold criterion for determining whether article I, section 14 is applicable," but departed from federal law by holding that "if article I, section 14 applies, warrantless searches will be permitted only where they satisfy their traditional justification, namely, to protect the safety of the police or the public or to prevent the destruction of evidence."

Id. at 469-70 (citations omitted).

Considered collectively, Watts, Thompson, Sims and the Larocco plurality make clear that article I, section 14 should generally be interpreted as is the fourth amendment by the federal courts. Only in those infrequent instances where the federal courts have vacillated between various standards such that "the vagaries of inconsistent interpretations [of] the fourth amendment" Watts, 750 P.2d at n. 8, have become so prevalent that it is necessary "to simplify . . . the search and seizure rules so that they can be more easily followed by the police and the courts and, at the same time, provide the public with consistent and predictable protection against unreasonable searches and seizures," Larocco 794 P.2d at 469, should Utah courts embark upon a journey into article I, section 14 of the Utah Constitution. Defendant has advanced no such claim in this case, and it is clear that federal courts have uniformly applied the Schneckloth voluntariness test for consent searches. This Court should therefore hold that there is not basis for departing from Schneckloth under the narrow Watts exception.

POINT III

EVEN IF THE WATTS THRESHOLD TEST FOR DEPARTING FROM THE FEDERAL VOLUNTARINESS STANDARD FOR CONSENSUAL SEARCHES WERE SATISFIED, ADOPTION OF DEFENDANT'S PROPOSED INTERPRETATION OF ARTICLE I, SECTION 14 IS NOT SUPPORTED BY THE ANALYSIS CALLED FOR UNDER STATE V. BOBO

If this Court decides that the Watts requirements for departing from fourth amendment interpretation have been met,

then it should look to its opinion in State v. Bobo, 803 P.2d 1268, 1272 (Utah App. 1990) for further guidance on the question of whether defendant's proposed interpretation of article I, section 14 should be adopted. As demonstrated below, all of the Bobo factors militate against departure from the federal standard.

The question of whether article I, section 14 of the Utah Constitution requires that the State prove that a defendant was aware of his right to decline a request to search before consent to that search may be deemed valid was first raised in Bobo. In Bobo, this Court refused to reach the issue because of inadequate briefing. Bobo, 803 P.2d at 1272.[5] However, in a footnote, the Bobo court suggested a three part analysis to employ when advancing novel state constitutional arguments: 1) Counsel should offer analysis of the unique context in which Utah's constitution developed; 2) Counsel should demonstrate that state appellate courts regularly interpret even textually similar state constitutional provisions in a manner different from their federal counterparts; and 3) Citation should be made to authority from other states supporting the particular construction urged by counsel. Id. at 1272 n.5. An analysis of defendant's proposed construction of article I, section 14 demonstrates that there is

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[5] The same issue, as well as the question of whether a Miranda-type warning should be required like that advocated by defendant, also was presented in State v. Hewitt, 814 P.2d 1222 (Utah App. 1992). In Hewitt, this Court properly declined to address the state constitutional issue because the State conceded that defendant's consent was involuntary under the fourth amendment and that suppression was required. Id. at 1224 n. 1.

no basis for departing from the federal standard for determining voluntariness of consent to a search.

1. The Historical Context Surrounding the Adoption of Article I, Section 14 Weighs Against Departing from the Federal Standard for Determining Voluntariness of a Consent to Search.

The first factor to consider in evaluating a state constitutional argument under Bobo is the historical context in which the particular provision under review was adopted. Defendant appears to argues, with little elaboration, that because the Utah Constitution was drafted during an era of popular mistrust and hostility toward government, "[g]iving the people broader protections under Article I, Section 14 of the Utah Constitution is consistent with the historical development of the Utah Constitution." See Brief of Appellant at 15-16. While at first blush defendant's argument may have some appeal, closer scrutiny reveals that it is significantly flawed.

If the framers of Utah's constitution were dissatisfied with the scope of protection provided by the fourth amendment, one would have expected them to draft a textually different search and seizure provision rather than adopting language that is nearly identical to that of the fourth amendment. Indeed, a review of the history of article I, section 14 also indicates that the framers of Utah's constitution did not intend Utah's search and seizure provision to be interpreted differently than

its federal counterpart.[6]

The development of Utah's search and seizure provision prior to the adoption of article I, section 14 reflects a steady movement by the framers toward adoption of the precise wording of the fourth amendment. (See Addendum D of this brief for a textual history of article I, section 14.) With each progressive revision of Utah's search and seizure provision, its language became more similar to that of the fourth amendment. Only its original version, that of 1849, is significantly different from the fourth amendment. That language was jettisoned in 1872 in favor of language very similar that of the fourth amendment. Each successive revision from that point forward constituted only minor stylistic changes until the current provision, which is virtually identical to the fourth amendment, was adopted in 1895. That the framers of the Utah Constitution essentially adopted the fourth amendment is significant because it suggests an intent to provide protections equivalent to those provided under the federal provision.

In contrast, it is obvious that when they were concerned about the trampling of particular individual rights by State authorities, the framers signaled that concern by drafting

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[6] The only reference to article I, section 14 at the Constitutional Convention of 1895 was as follows:

> The Chairman: Gentlemen, we will take up section 14,
>
> Section 14 was read and passed without amendment.

1 Official Report of Proceedings and Debates of the Convention: 1895 319 (1898).

extensive protective provisions that were textually distinct from those of the federal constitution. For instance, the provisions of the Utah Constitution that deal with religious freedom and other inalienable rights are very different from their federal counterparts. See Utah Const. art. I, §§ 1 & 4. Instead of adopting the language of the first amendment, the framers of Utah's constitution drafted detailed religious freedom and separation of church and state provisions in order to demonstrate to the citizens, and to congress, that religious tyranny would not be tolerated in Utah. Ibid. See generally Society of Separationists v. Whitehead, 227 Utah Adv. Rep. 67 (Utah 1993) (detailing history of Utah with respect to development of Utah Const. art. I, §§ 1 & 4). Were the framers similarly concerned about the adequacy of the protections afforded citizens under the fourth amendment, then article I, section 14 surely would feature more detailed and expansive language than that of the fourth amendment. Instead, the framers drafted a search and seizure provison that, except for some minor grammatical changes, was identical to the fourth amendment and then adopted it without comment. See note 6, supra.

Neither the Utah Supreme Court nor this Court have opined that the drafters of article I, section 14 intended that it be construed differently than the fourth amendment. Indeed, Utah's court have implicitly recognized that there is nothing in Utah's history, and especially the history of article I, section 14, that justifies departing from the federal search and seizure

standards developed under the fourth amendment. As discussed under Point II, instead of relying upon the historical context in which article I, section 14 was adopted as the basis for rejecting federal search and seizure law, Utah's courts have departed from the federal standards only in the limited circumstances articulated in Watts. See Thompson, 810 P.2d at 418; Sims, 808 P.2d at 149. See also Larocco, 794 P.2d at 469 (plurality opinion).

2. Although the Language of Article I, Section 14 is Nearly Identical to that of the Fourth Amendment, the Utah Provision May Be Interpreted Differently From the Federal Provision Under the Narrow Circumstances Articulated in State v. Watts.

According to Bobo, the second factor to analyze in developing novel state constitutional arguments is the appellate treatment of state constitutional provisions that are textually similar to their federal counterparts. As previously explained, the Utah Supreme Court articulated its position with respect to how article I, section 14 should be interpreted in Watts. A review of case law from other jurisdictions indicates that, although Schneckloth has been the target of some criticism among commentators[7], that criticism has remained almost exclusively academic. Schneckloth continues to enjoy near universal acceptance among the state courts.

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[7] See, e.g., 3 W. LaFave, Search and Seizure: A Treatise On The Fourth Amendment, § 8.1(a), at 152-154 (2d ed. 1987). But see The Supreme Court, 1972 Term, 87 Harv.L.Rev. 55, 218-19 (1973) (although critical of some of the Court's reasoning, the author concludes "the ultimate result in Bustamonte appears to be correct").

3. Nearly Every Jurisdiction Continues to Follow the Totality of Circumstances Test for Voluntariness Enunciated by the United States Supreme Court in Schneckloth v. Bustamonte.

The final factor identified by this Court in Bobo for the analysis of novel state constitutional arguments is citation to authority from other states supporting the particular construction urged by counsel. Bobo, 803 P.2d at 1272-73 n.5. Under this "sibling state" approach, particular attention should be given to those states whose constitutions served as models for the Utah Constitution, as well as to authority from states in the same geographical region. See State v. Jewitt, 146 Vt. 221, 500 A.2d 233, 237 (1985) (describing "sibling state" approach) (cited in Bobo, 803 P.2d at 1272-73 n.5). Some commentators have identified several states whose constitutions served as models for the framers of the Utah Constitution: Illinois, Iowa, Nevada, New York, and Washington.[6] A review of decisions from the courts of these states indicates that none have adopted positions that support defendant's proposed interpretation of Article I, Section 14.

Those commentators who have suggested that the Illinois Constitution served as a model for the Utah Constitution apparently have done so because many Mormon leaders had experience with the Illinois government from their time in Nauvoo, Illinois. At least one commentator has argued, however,

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[6] See Ken Wallentine, Heeding the Call: Search and Seizure Jurisprudence Under the Utah State Constitution, Article I, Section 14, 17 Utah J. Contemporary L. 267, 282 (1991), hereinafter, "Wallentine," and authorities cited therein.

that the search and seizure provision of the Illinois constitution "does not appear to be the model for article I, section 14" because its wording is "substantially different" from the Utah provision. See Paul G. Cassell, The Mysterious Creation of Search and Seizure Exclusionary Rules Under State Constitutions: The Utah Example, 1993 Utah L. Rev. 751, 801 (1993), hereinafter "Cassell." In any event, even before Schneckloth was decided, Illinois refused "to require that the People show that the consenting party was advised of rights secured by the fourth amendment, [but] the failure to do so is a factor bearing on the understanding [of the] nature of the consent." People v. Haskell, 41 Ill.2d 25, 31, 241 N.E.2d 430, 434 (1968) (citations omitted). Illinois now applies the voluntariness standard articulated in Schneckloth. See, e.g., People v. Sesmas, 591 N.E.2d 918 (Ill.App. 1992) ("Moreover, ignorance of knowledge of the right to refuse to consent does not vitiate the voluntariness of the consent but is merely a factor to consider.") (citations omitted).

> Similarly, the Iowa Supreme Court has stated that
>
> the search and seizure provisions of the United States and Iowa Constitutions contain identical language. Consequently, they generally are "deemed to be identical in scope, import, and purpose."

State v. Bishop, 387 N.W.2d 554, 557 (Iowa 1986) (citations omitted). In keeping with its general rule, Iowa has adopted Schneckloth and has expressly noted that "knowledge of the right to refuse consent is only one factor to be considered in

answering the question of voluntariness." State v. Ege, 274 N.W.2d 350, 353 (Iowa 1979) (citing Schneckloth, 412 U.S. at 227, 93 S. Ct. at 2047-48).

Washington does not appear to have expressly considered departing from Schneckloth. Rather, it has consistently applied the totality of circumstances test for determining voluntariness of consent. See, e.g., State v. Nelson, 734 P.2d 516, 519-520 (Wash. 1987) (citing Schneckloth and several Washington cases in which Schneckloth was applied). It should be noted, however, that while the Washington Constitution may have served as a guide for the Utah framers generally, Professor Cassell persuasively argues that "Washington's Constitution was plainly not the basis for article I, section because Washington adopted much broader protection of personal privacy than did Utah." Cassell, supra at 801.

Of those states whose constitutions served as a model for the Utah Constitution, New York appears to have been the most willing to depart from federal search and seizure law. See Wallentine, *supra* at 283 (citing several New York cases to support the proposition that "New York courts had consistently interpreted the New York Constitution as offering significantly greater protection against unreasonable searches and seizures than does the fourth amendment"). The obvious problem with Wallentine's citation to the New York Constitution as a possible influence on the framers of article I, section 14 is that "New York did not adopt a constitutional prohibition against

unreasonable searches and seizures until well after the Utah Constitution was adopted." Cassell, supra at 801 (footnote omitted). See also New York Const. art. I, § 12 (adopted Nov. 8, 1938). Moreover, despite their willingness to depart from federal search and seizure law in other contexts, New York courts continue to apply the Schneckloth standard to evaluate consensual searches. See, e.g., People v. Khatib, 555 N.Y.S.2d 1008, 1010 (Sup. 1990) (applying Schneckloth and citing several other New York cases in which Schneckloth was applied).

Professor Cassell suggests in his article that the Nevada Constitution is a "plausible source for article I, section 14[.]" Cassell, supra, at 802. He bases that conclusion on the fact that the Nevada Constitution of 1864 was "a principle reference work" for the framers and because "it appears that Utah's draft Constitution of 1872 incorporated Nevada's search and seizure guarantee." Id. (footnotes omitted). It was not until the Utah draft Constitution of 1895 that Utah's search and seizure provision was altered slightly, possibly to complete a "stylistic cleanup." Id. at 802-03. If Cassell is correct, then how Nevada courts have interpreted that state's search and seizure provision may be of particular interest under the Bobo analysis.

Nevada has expressly adopted the Schneckloth standard for determining voluntariness of consent. Reese v. State, 596 P.2d 212, 214 (Nev. 1979). In so doing, the Nevada Supreme Court recognized that one state, New Jersey, had departed from

Schneckloth under its state constitution. Id. (citing State v. Johnson, 68 N.J. 349, 346 A.2d 66 (1975)). Nevertheless, the Reese court reaffirmed its adherence to Schneckloth, noting that "[t]his court has never indicated that a different standard should apply in this state, but is in accord with the rule that voluntariness [of consent] is a question of fact to be determined from all the circumstances." Id. (emphasis in original) (citations omitted). Nevada continues to follow Schneckloth. Passama v. State, 735 P.2d 321, 323 (Nev. 1987).

Just as none of the states whose constitutions served as models for the Utah constitution have adopted positions that support defendant's proposed interpretation of Article I, Section 14, nor have any of the western states departed from Schneckloth. See, e.g., State v. Paredes, 810 P.2d 607, 610 (Ariz. App. 1991)[9]; People v. Hill, 839 P.2d 984, 994 (Cal. 1992); State v. Bedolla, 806 P.2d 588, 593 n.2 (N.M. App. 1991); Stamper v. State, 662 P.2d 82, 87 (Wyo. 1983) (all applying Schneckloth). Even before Schneckloth was decided, a number of western states rejected the suggestion that police be required to inform a suspect that he had the right to refuse the officer's request for consent to search. See Schneckloth, 93 S. Ct. at 2050 n.14

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[9] See also State v. Knaubert, 550 P.2d 1095, 1099 (Ariz. 1976) ("Defendant has cited no authority [for the proposition] that the Arizona Constitution requires that the record show that an in custody defendant knew that he had the right to refuse to consent to the search. Absent such authority, we are unwilling to apply a more stringent requirement under the Arizona Constitution than is imposed by the Fifth Amendment to the United States Constitution.") (emphasis added).

(citing cases from California, Florida, Idaho, Kansas, Missouri, Nebraska and Oregon, among others). None of these states appear to have since departed from their original positions or from Schneckloth.

More importantly, several of Utah's neighboring states have expressly refused to depart from Schneckloth under their state constitutions. See, e.g., People v. Hayhurst, 571 P.2d 721, 724 n.4 (Colo. 1977) (refusing to require Miranda-type warning under the state constitution and citing several pre-Schneckloth Colorado decisions for the same proposition); University of Colorado v. Derdeyn, 863 P.2d 929, 946 (Colo. 1993) (Colorado continues to applies Schneckloth); State v. Christofferson, 610 P.2d 515, 517 (Idaho 1980) (refusing to require defendants be advised of their right to refuse consent under state constitution and reaffirming its adoption of the federal standard); State v. Stemple, 646 P.2d 539, 541 (Mont. 1982) (refusing to impose a stricter standard under the Montana Constitution than that required under Schneckloth); State v. Flores, 570 P.2d 965, 968 (Or. 1977); (declining to interpret state constitution more restrictively than fourth amendment and rejecting Miranda-type warning requirement); State v. Bea, 864 P.2d 854, 860-61 (Or. 1993) (Oregon continues to apply Schneckloth).

Expanding the scope of inquiry to include the rest of the states, it is clear that Schneckloth enjoys near universal acceptance. At least four additional states have refused to

interpret their state constitutions as requiring a more stringent standard of voluntariness than that required under the fourth amendment. See Frink v. State, 597 P.2d 154, 169 (Alaska 1979) (After noting that the language of Article I, Section 14 of the Alaska Constitution is almost identical to the fourth amendment, the court held that "[t]he Court in Schneckloth rejected the argument [that the state must prove that defendant knew of his right to refuse consent to the search], and we do not believe that the Alaska Constitution requires a different standard for noncustodial consent searches."); King v. State, 557 S.W.2d 386, 389 (Ark. 1977) ("In our view the Schneckloth standard of required proof in consent to search is adequate under the terms of our constitution. Art. 2, § 15, Ark. Const. (1874)."); State v. Osborne, 402 A.2d 493, 497 (N.H. 1979) (refusing to impose heavier burden under the New Hampshire Constitution than that required under Schneckloth); State v. Sullivan, 534 A.2d 384, 387 (N.H. 1987) (New Hampshire applies Schneckloth standard); State v. Rodgers, 349 N.W.2d 453, 459 (Wis. 1984) (declining to adopt different definition of consent under state constitution than that required under fourth amendment).

Although one court has said that "it would be a good policy for police officers to advise persons that they have a right to refuse to consent to a warrantless search [even though that procedure is not] constitutionally required," Osborne, 402

A.2d at 498,[10] the Schneckloth standard for determining voluntariness of consent enjoys overwhelming acceptance among the states. See also Juarez v. State, 758 S.W.2d 772, 781 n.5 (Tex.Cr.App. 1988) (noting that warning of right to refuse consent is "good police practice," but nevertheless embracing Schneckloth). Moreover, the State has been unable to find even a single court that has decided to require law enforcement to give suspects a Miranda-type consent warning.[11] Indeed, it appears that only two states, Mississippi and New Jersey, have departed from Schneckloth. See State v. Ellis, 586 A.2d 876 (N.J.Super. 1990), and State v. Johnson, 346 A.2d 66 (N.J. 1977) (under the New Jersey Constitution, the validity of a consent to search, even in a noncustodial situation, must be measured in terms of waiver, an essential element of which is knowledge of the right to refuse consent); Longstreet v. State, 592 So.2d 16, 19 (Miss. 1991) ("[V]alid consent to an otherwise illegal search must be accompanied by a *knowledgeable waiver* of a person's constitutional right not to be searched. . . . In other words, for a search which is based on *consent alone*, it is necessary that the person searched be aware of the right to refuse under

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[10] But as previously noted, even the court in Osborne refused to depart from Schneckloth under its state constitution. Osborne, 402 A.2d at 497.

[11] After Miranda was decided, at least one commentator predicted that courts would require that police give a "Miranda-type" warning when requesting consent to search. See Wilberding, "Miranda-Type Warnings for Consent Searches?", 47 N.D.L.Rev. 281, 284 (1971). Nevertheless, the concept of Miranda-type warnings for consent searches has been universally rejected by the courts.

the law.") (emphasis in original) (citing Penick v. State, 440 So.2d 547, 550-51 (Miss. 1983)). Neither New Jersey nor Mississippi have, however, gone so far as to require that police give a Miranda-type warning like that proposed by defendant, and, as noted above, numerous courts have rejected that concept.

In sum, nothing in Utah's history, especially the history of article I, section 14, indicates that the framers intended that article I, section 14 be interpreted any differently than the fourth amendment. Indeed, the steady progression toward language that is virtually identical to the fourth amendment suggests the contrary. While the Utah Supreme Court has allowed for a narrow basis for departing from fourth amendment jurisprudence despite that similarity, such action is not warranted in this context. As its near universal acceptance demonstrates, the Schneckloth standard has been uniformly applied since its inception. No state has adopted the Miranda-type warning advocated by defendant; only two have even departed from Schneckloth in any respect. Accordingly, even under the Bobo analysis, there is no basis for interpreting article I, section 14 in a manner different from the fourth amendment as defendant argues. In fact, all of the Bobo factors weigh in favor of rejecting defendant's proposed interpretation of article I, section 14. This Court should therefore uphold the trial court's decision to follow the general rule of interpreting article I, section 14 consistent with the fourth amendment.

CONCLUSION

Based on the foregoing arguments, this Court should uphold the trial court's order denying defendant's motion to suppress and affirm defendant's conviction.

RESPECTFULLY SUBMITTED this 30th day of June, 1994

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CERTIFICATE OF MAILING

I hereby certify that a true and accurate copy of the foregoing brief of appellee was mailed via first class mail to Stephen R. McCaughey and G. Fred Metos, attorneys for appellant, 72 East Fourth South, Suite 330, Salt Lake City, Utah 84111, this 30th day of June, 1994.

Todd A. Utzinger

Addenda

Addendum A

Trial Court's Memorandum Decision

IN THE FOURTH JUDICIAL DISTRICT COURT

JUAB COUNTY, STATE OF UTAH

STATE OF UTAH,

Plaintiff,

CASE NUMBER: 920133

vs.

JAMES JOHN CONTREL,

MEMORANDUM DECISION

Defendant.

Having received and considered defendant's Motion to suppress, together with memoranda both in support and in opposition to the motion, and after an evidentiary hearing of the matter, the Court hereby denies the motion. The Court finds that the officers involved in this case had a reasonable and articulable suspicion justifying the stop pursuant to U.C.A. § 77-7-15 (1953 as amended) and that the officers conducted the subsequent search of defendant's vehicle based on defendant's consent and voluntary waiver of his Fourth Amendment rights.

Defendant contends that the evidence at issue in this case was obtained by way of an illegal stop. However, it is clear that:

> . . . An officer may seize a person if the officer has an "articulable suspicion" that the person has committed or is about to commit a crime; however, the detention must

be temporary and last no longer than is necessary to effectuate the purpose of the stop.

Florida v. Royer, 460 U.S. 491 (1983). Based on the evidence presented, the Court finds that the officers' suspicion that defendant was transporting contraband in a concealed compartment of the modified vehicle was both reasonable and articulable based on the officers' observations and experience. At the hearing of this matter, Sergeant Mangelson testified that he made several observations prior to stopping the vehicle:

1. The vehicle was a 1990 Chevrolet pickup.
2. The edge of the rear bumper had been bent so as to conceal the area behind it.
3. The gas tank was much lower than that of a stock model truck.
4. The vehicle had been recently undercoated (observable in the rear tire area).
5. Unlike stock model vehicles, the vehicle had no air space between the truck bed and the frame.
6. The vehicle also had bright yellow, over-sized shock absorbers, a bed liner, and a tool box in the bed area.

Based on the foregoing observations, Sgt. Mangelson noted that the vehicle was identical in every respect (except for its color) to a vehicle seized several months earlier containing a secret compartment behind the bumper in which Mangelson had discovered large quantities of contraband. From his personal experience with this prior case, Mangelson learned that the sole apparent purpose for many of the unique modifications enumerated above was to conceal and transport contraband. Based upon this specific prior personal experience with a virtually identical modified vehicle, the sergeant's suspicion was reasonable.

The fact that the stop was "temporary" and lasted no longer than necessary to "effectuate the purpose of the stop" is evident from defendant's admission that "Sergeant Mangelson requested the consent to search immediately after stopping the vehicle." (Defendant's memorandum, page 17).

Although defendant does not deny that he gave his consent to search the vehicle both orally and in writing, he contends that his consent should somehow be invalidated because the officers did not explicitly inform him that he could refuse his consent. Defendant's position is that because he was not informed of his right to refuse his consent, the consent did not constitute a "knowing" waiver of such right. However, defendant cites no Utah authority for his position. In fact, defendant admits that a showing of defendant's "knowledge" is not a requirement for a valid waiver under either the federal Constitution (citing Schneckloth v. Bustamonte, 412 U.S. 218 (1973)) or under the apparent "majority" of the state constitutions of other jurisdictions. (Defendant's Memorandum pages 10, 14). The only constitutional requirement is that defendant's waiver be voluntary. Based on the evidence presented it is evident that defendant voluntarily waived his rights upon giving his written consent. Under the facts and circumstances of the present case, the Court finds no justification for interpreting the Utah Constitution as providing broader protections than those guaranteed by the U.S. Constitution.

At any rate, even if this Court were required to make a finding regarding defendant's "knowledge" of his waived rights, the Court would be inclined to find that defendant was in fact aware of his right to withhold his consent before giving his written consent in this case.

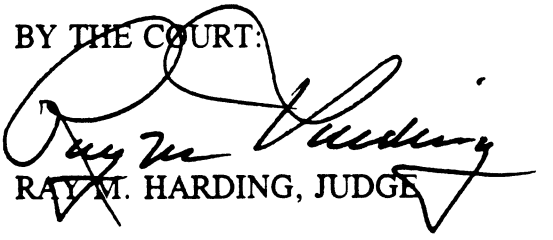
Based on the foregoing the Court must conclude that the officer's search of defendant's car did not violate the defendant's Fourth Amendment rights. Accordingly, the evidence discovered thereby will not be suppressed.

Counsel for the State is to prepare an order within 15 days of this decision consistent with the terms of this memorandum and submit it to opposing counsel for approval as to form prior to submission to the Court for signature. This memorandum decision has no

effect until such order is signed by the Court.

Dated this 17th day of February, 1993.

BY THE COURT:



RAY M. HARDING, JUDGE

cc: Donald J. Eyre Jr., Esq.
Stephen R. McCaughey, Esq.

Addendum B

Trial Court's Order Denying Motion to Supress

Donald J. Eyre Jr., No. 1021
Juab County Attorney
125 North Main Street
Nephi, Utah 84648
Telephone: 623-1141

IN THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR

JUAB COUNTY, STATE OF UTAH

THE STATE OF UTAH,	:	
Plaintiff,	:	ORDER DENYING MOTION TO SUPPRESS
vs.	:	
		Criminal No. 920133
JAMES JOHN CONTREL,	:	
Defendant.	:	

Based upon the Findings of Fact and Conclusions of Law previously entered by the Court, IT IS HEREBY ORDERED that the Defendant's Motion to Suppress is denied.

Dated this 8 day of April, 1993.

District Judge

Addendum C

Trial Court's Findings of Fact
and Conclusions of Law

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125 North Main Street
Nephi, Utah 84648
Telephone: 623-1141

IN THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR

JUAB COUNTY, STATE OF UTAH

THE STATE OF UTAH,	:	
Plaintiff,	:	FINDINGS OF FACT AND CONCLUSIONS OF LAW
vs.	:	
		Criminal No. 920133
JAMES JOHN CONTREL,	:	
Defendant.	:	

The above entitled matter came on regularly for hearing on October 22, 1992 upon the Defendant's Motion to Suppress before the Honorable Ray M. Harding. The defendant was present and represented by his attorneys, Stephen R. McCaughey and Barry Witlin. The State of Utah was represented by Donald J. Eyre Jr., Juab County Attorney.

The Court having heard the evidence introduced by both the plaintiff and defendant, reviewed the Memorandums of Law and arguments of counsel, and having submitted its Memorandum Decision.

The Court being fully advised in the premises makes the

following:

FINDINGS OF FACT

1. On February 4, 1992 Sergeant Paul Mangelson, a 25 year veteran of the Utah Highway Patrol was patrolling I-15 within Juab County together with Trooper Lance Bushnell.

2. Both Sergeant Mangelson and Trooper Bushnell have had extensive training and experience in the area of drug law enforcement and drug identification. Sergeant Mangelson has been involved in many cases involving compartments within motor vehicles used to conceal controlled substances.

3. While patrolling, Sergeant Mangelson observed a northbound pickup truck, and made the following observations prior to stopping the vehicle:

a. The vehicle was a 1990 Chevrolet pickup.

b. The edge of the rear bumper had been bent so as to conceal the area behind it.

c. The gas tank was much lower than that of a stock model truck.

d. The vehicle had been recently undercoated (observable in the rear tire area).

e. Unlike stock model vehicles, the vehicle had no air space between the truck bed and the frame.

f. The vehicle also had bright yellow, oversized shock

absorbers, a bed liner, and a tool box in the bed area.

4. Sergeant Mangelson noted that the vehicle was identical in every respect (except for its color) to a vehicle he had seized several months earlier containing a secret compartment behind the bumper in which Mangelson had discovered large quantities of contraband.

5. Based upon Sergeant Mangelson's observations and his past experience, the officers stopped the vehicle, with the intent to search the vehicle for a hidden compartment.

6. The driver of the vehicle was the defendant, James John Contrel. The driver produced a Florida driver's license and a Pennsylvania registration. The driver said the vehicle belonged to his friend Carmen, but he did not know Carmen's address or telephone number.

7. The officer asked the defendant if he was transporting drugs or if there were any firearms or contraband in the vehicle. The defendant replied "No". The officer then asked for consent to search the vehicle. The defendant gave consent to search the vehicle, both orally and in writing.

8. The officers then went to the rear of the vehicle and accessed the secret compartment, exactly as Sergeant Mangelson did in the previous case, and after they removed the cover plate, found in excess of 100 lbs. of marijuana in the hidden compartment. The defendant was thereafter arrested.

Pursuant to the above Findings of Fact, the Court makes the following:

CONCLUSIONS OF LAW

1. The stop of the subject vehicle was a constitutionally valid stop based upon reasonable suspicion that the subject vehicle had a hidden compartment containing contraband.

2. The detainment of the defendant after the stop was reasonable to effectuate the purpose of the stop.

3. The defendant's consent to search the vehicle and waiver of his constitutional rights was voluntary.

4. Although a knowing waiver of his constitutional rights under the U.S. and Utah Constitution is not necessary when giving a consent to search, the defendant in this case did make a knowing waiver when he gave his written consent.

5. The defendant's Motion to Suppress should be denied.

Dated this 8 day of April, 1993.

District Judge

Approved as to form:

Attorney for Defendant

Addendum D

Textual History of Utah Const. Art. I, § 14

I. HISTORY OF SEARCH AND SEIZURE PROVISION IN UTAH CONSTITUTION.

The following history may be found at the Utah State Archives under the title "Constitution State of Deseret and Utah Constitutions, Memorials to Congress, and Proceedings of Convention 1849-1959," Microfilm Document No. 080979, C. Reel I (1849-1895), Utah State Archives No. 700-0000-1400:

1. Article VIII, Section 6 of the Constitution of the State of Deseret (1849):

> The people shall be secure in their persons, houses, papers and possessions, from unreasonable searches and seizures.

2. Article I, Section 18 of the Constitution of the State of Deseret (1872):

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable seizures and searches, shall not be violated; and not warrant shall issue but on probable cause, supported by oath or affirmation, particularly describing the place or places to be searched, and the person or persons, and thing or things, to be seized.

3. Article I, Section 16 of the Constitution of the State of Utah (1882):

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable seizures and searches, shall not be violated; and not warrant shall issue but on probable cause, supported by oath or affirmation, particularly describing the place or places to be searched, and the person or persons, and thing or things, to be seized.

4. Article I, Section 19 of the Constitution of the State of Utah (1887):

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable seizures and searches, shall not be violated, and not warrant shall issue but on probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons or things to be seized.

5. Article I, Section 14 of the Constitution of the State of Utah (1895) (current provision):

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable seizures and searches shall not be violated; and not warrant shall issue but on probable cause supported by oath or affirmation, particularly describing the place to be searched and the person or thing to be seized.

II. FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

> The right of the people to be secure in their persons, house, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.